

**REMARKS**

Applicants respectfully request reconsideration of the instant application in view of the foregoing amendments and the following remarks. Claims 31, 38-41, 55, 61, 65-68, and 115 are pending. Claims 1-30, 32-37, 42-54, 56-60, 62-64 and 69-114 have been previously cancelled without prejudice or disclaimer. Claims 31, 55, and 115 are independent. Claims 31, 55 and 115 have been amended by way of this response; although these claims have been amended herein to provide clarification, correct typographical inaccuracies and/or informalities, and/or to better track practical/commercial implementations/practices, Applicants submit that the originally filed claims are patentable and reserve the right to pursue the originally filed claims (as well as any claims dependent therefrom) at a later time and/or in one or more continuation/divisional application(s). Applicants submit that these claim amendments are supported throughout the originally filed specification, figures and claims, and that no new matter has been added by way of these amendments.

**Claim Rejections - 35 U.S.C. § 103(a)**

Claims 31, 38-41, 55, 61, 65-68, and 115 have been rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over McCall et al. US Patent No. 6,321,984 (hereafter "McCall"), in view of Infinity Trading Group, from January 9, 1998, infinitytrading.com (hereafter "Infinity") and further in view of "Weather Futures bet will give Tucson firms a hedge against loss," Arizona Daily Star, Tucson, Arizona, 5 February 1999 (hereafter "Weather Futures"). Although Applicants respectfully traverse the Examiner's rejections and submit that a *prima facie* case of obviousness has not been established and that the pending claims are patentably distinct from the cited references, taken alone or in combination, for at least the following reasons, Applicants have amended independent claims 31, 55 and 115 to provide

clarification, correct typographical inaccuracies and/or informalities, and/or to better track practical/commercial implementations/practices.

MPEP § 706.02(j) prescribes that a rejection under 35 U.S.C. § 103 should set forth:

- (i) the relevant teachings of the prior art relied upon,
- (ii) the differences in the claim over the applied references,
- (iii) the proposed modification of the applied references to arrive at the claimed subject matter, and
- (iv) an explanation as to why the claimed invention would have been obvious to one of ordinary skill in the art at the time the invention was made.

Applicants submit that the rejections in the Office Action do not establish at least the first two requirements above, the relevant teachings of the prior art relied upon, as well as the differences in the claim over the applied references.

Independent claim 31 recites, *inter alia*,

A processor-enabled method for providing a program price for the purchase of a vehicle fuel, comprising:

...  
calculating ... a customer-specific, fixed, guaranteed program price ... using customer expected fuel usage data, other customers' conditions and said finder's fee amount of said program sponsor data, ...

using customer expected fuel usage data, other customers' conditions, said finder's fee amount of said program sponsor data and said market indicator to develop a financial hedging strategy ...

...  
ascertaining a mode of payment made by a customer said program price based at least in part on the program sponsor.

In the pending rejection, the Examiner acknowledges McCall does not disclose the previously presented "using customer expected fuel usage data, ... said finder's fee amount of said program sponsor data and said market indicator to develop a financial hedging strategy ..."

(p. 8, ¶ 2, Office Action), but attempts to remedy this deficiency in McCall by Weather Futures (p. 9, ¶ 1, Office Action). Applicants respectfully traverse.

Applicants submit Weather Futures generically discusses hedging weather-related risks. More specifically, Weather Futures discusses "...a natural gas company could 'hedge' against lost revenues if warm winter temperatures cut sales ..." (¶ 3, Weather Futures). Applicants submit the recitation of a generic weather-related risk "hedge" in Weather Futures makes no mention of "... using customer expected fuel usage data, other customers' conditions, said finder's fee amount of said program sponsor data and said market indicator ..." as recited in amended independent claim 31. Applicants further submit that Infinity, which discusses the use of "NYMEX Division heating oil contract" (Infinity), does not discuss or render obvious at least the claimed "... using ... other customers' conditions ..." as recited in amended independent claim 31. Should the Examiner maintain his position, Applicants respectfully request the Examiner provide explicit cited portions of Weather Futures and clarification with particularity as to how Weather Futures allegedly discusses the claimed "... using customer expected fuel usage data, other customers' conditions, said finder's fee amount of said program sponsor data and said market indicator to develop a financial hedging strategy ..." as recited in amended independent claim 31.

Applicants further submit that none of the cited references discuss or render obvious the claimed "ascertaining a mode of payment made by a customer said program price based at least in part on the program sponsor ..." as recited in amended independent claim 31. As such, Applicants submit a *prima facie* case of obviousness is not established with regard to independent claim 31.

Applicants further note that the Examiner acknowledges McCall does not disclose "using the customer expected usage data along with the program sponsor data ... to determine a guaranteed fixed program price for fuel ..." (p. 4, ¶ 3, Office Action), and then alleges that "the claimed use of the 'program sponsor data' and 'customer expected usage data' to determine the guaranteed program price... is considered to be obvious..." (p. 8, ¶ 1, Office Action). Applicants respectfully traverse the Examiner's allegation. Applicants further submit the Examiner has not even cited to any reference or taken Official Notice with regard to the previously presented "... calculating ... a customer-specific, fixed, guaranteed program price ... using customer expected fuel usage data, ... and said finder's fee amount of said program sponsor data ..." as recited in independent claim 31. Applicants submit that, by making general allegations of obviousness without even citing to an applied reference or taking Official Notice, the pending rejection has necessarily relied on knowledge gleaned only from Applicants' disclosure. MPEP §2141 (III) states, *inter alia*, "The key to supporting any rejection under 35 U.S.C. 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious," and that, "there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." As the pending rejection has failed to supply the requisite objective rationale for the proposed modifications of the applied art, Applicants submit that a *prima facie* showing of obviousness has not been made and respectfully request reconsideration and withdrawal of this basis of rejections. Should the Examiner maintain the rejection, Applicants respectfully request that he cite to a reference or take Official Notice with regard to the noted claim elements, that he point to specific rationales for the proposed modifications of the prior art that are drawn from the references themselves, and that he provide

clarification and some explanation as to how he believes the stated rationales point to the specific modifications of the applied references proposed in the pending rejection.

In addition to the aforementioned lack of evidentiary support, Applicants further submit that impermissible hindsight has been applied in asserting obviousness of the various claim elements without citing prior art or providing an indication of the level of ordinary skill while the pending rejection refers to "... one of ordinary skill in the art at the time the invention was made ... ." MPEP § 2141 (II)(C) states, "Any obviousness rejection should include, either explicitly or implicitly in view of the prior art applied, an indication of the level of ordinary skill." The rejection's reference to "the art" is overly general and, consequently, does not provide a specific indication of the level of ordinary skill pertinent to the claimed subject matter. MPEP § 2141.03 (III) states, "The importance of resolving the level of ordinary skill in the art lies in the necessity of maintaining objectivity in the obviousness inquiry." Applicants are unclear as to what exactly the Examiner is alleging with regard to the level of ordinary skill and, thus, are not in a position to provide a complete reply that is most suited to addressing the Examiner's concerns. As no indication of the level of ordinary skill has been provided, Applicants submit that the rejection applies impermissible hindsight and has not made a *prima facie* showing of obviousness. Should the Examiner maintain his position, Applicants respectfully request that he identify the pertinent art, discuss the level of ordinary skill alleged to be associated therewith at the time of the invention, and clarify why he believes the claimed subject matter would have been obvious to one possessing that level of skill.

Applicants further note that with regard to at least claims 38-41, 55, 65-68, the Examiner has cited no reference but merely paraphrases the claim elements without an articulation of either the claim language or any allegedly relevant feature in the cited references

(pp. 10-11, Office Action). In the "Response to Arguments" section, the Examiner asserts "the Examiner has used the claim language in the analysis of prior art..." (p. 12, Office Action). Applicants reiterate that it is impossible for the Applicants to understand the rejections without citations from the applied references with particularity, as the claimed elements of those dependent claims are absent in the cited references and the Examiner has failed to show and/or particularly point out (as required) all elements of the claims. As such, Applicants respectfully request that the Examiner's rejection adhere to the language actually recited in the claims and substantively address all recited elements of the pending claims.

Furthermore, in the pending rejection, the Examiner further alleges that "For claim 115, ..., the claimed language of "on establishment of an affinity relationship between the program sponsor and the customer", this is taken as being directed to non-functional descriptive material" (p. 4, ¶ 2, Office Action). Applicants respectfully disagree and submit Applicants respectfully disagree and submit that the claimed elements of claim 115 are patentable subject matter despite the Examiner's allegations to the contrary. Applicants submit that the claimed elements are clearly set forth, as is the operative relationship between the claim elements as recited in claim 115. Applicants submit that in accordance with MPEP 2106.01, operative descriptive language is to be accorded patentable substantive weight and substantively examined. Applicants disagree with the Examiner's assertion that the claimed elements are merely "non-functional descriptive material" and request clarifications. Should the Examiner maintain the assertion, specifically Applicants request clarification as to how the claimed elements are equivalent to music, literary works, or a compilation or mere arrangement of data, as identified in MPEP 2106.01 as non-functional descriptive materials.

The MPEP prescribes that, "when evaluating the scope of a claim, *every limitation in the claim must be considered*," [§ 2106 II(C), emphasis added] and, "*All words* in a claim must be

considered in judging the patentability of that claim against the prior art.” [§ 2143.03, emphasis added]. Applicants submit that the pending rejection has failed to consider “every limitation in the claim” and “[a]ll words in [the] claim” in judging the patentability of the claim against the prior art by mischaracterizing claim elements and/or over-generalizing the applied reference(s). Accordingly, Applicants submit that the pending rejection has not established a *prima facie* showing of obviousness. Should the Examiner disagree, Applicants respectfully request the Examiner substantively consider “every limitation” and “[a]ll words” of the pending claims as required by the MPEP.

Although of different scope than independent claim 31, Applicants respectfully submit that independent claim 55 and 115 are also patentably distinct from the cited references for at least similar reasons discussed above with regard to independent claim 31. As claims 38-41, 61, 65-68 are directly or indirectly dependent from independent claims 31 and 55, Applicants submit that these claims are patentably distinct from the cited references for at least similar reasons as discussed above identifying deficiencies in the cited references with respect to the independent claims. Accordingly, Applicants respectfully request reconsideration and withdrawal of these grounds of rejections.

### **CONCLUSION**

Consequently, the references cited by the Office Action do not result in the claim elements, there was/is no reason, rationale or motivation (i.e., cited references do not teach, read on, suggest, or result in the claimed invention(s)) for such a combination of references, and the claimed inventions are not admitted to be prior art. Thus, the Applicants respectfully submit that the supporting remarks and claimed inventions, claims 31, 38-41, 55, 61, 65-68 and 115 overcome all rejections and/or objections as noted in the Office Action, are patentable over and discriminated from the cited reference(s), and are in a condition for allowance. Furthermore,

Applicants believe that the above remarks, which distinguish the claims over the cited reference(s), pertained only to noted claim element portions. These remarks are believed to be sufficient to overcome the prior art. While many other claim elements were not discussed here or in previous amendments/responses, Applicants assert that all such remaining and not discussed claim elements, all, also are distinguished over the prior art and reserves the opportunity to more particularly remark and distinguish such remaining claim elements at a later time should it become necessary. Further, any remarks that were made in response to an Examiner objection and/or rejection as to any one claim element, and which may have been re-asserted as applying to another Examiner objection and/or rejection as to any other claim element(s), any such re-assertion of remarks is not meant to imply that there is commonality about the structure, functionality, means, operation, and/or scope of any of the claim elements, and no such commonality is admitted as a consequence of any such re-assertion of remarks. As such, Applicants do not concede that any claim elements have been anticipated and/or rendered obvious by any of the cited reference(s). Accordingly, Applicants respectfully request allowance, and the reconsideration and withdrawal of the rejection(s) and/or objection(s).

If a telephone conference would facilitate prosecution of this application in any way, the Examiner is invited to contact the undersigned at the number provided.



**AUTHORIZATION**

Applicant hereby authorizes and requests that the Commissioner charge any additional fees that may be required for consideration of this and/or any accompanying and/or necessary papers to Deposit Account No. 03-1240, Order No. 17209-075. In the event that an extension of time is required (or which may be required in addition to that requested in a petition for an extension of time), Applicant requests that the Commissioner grant a petition for an extension of time required to make this response timely, and, Applicant hereby authorizes and requests that the Commissioner charge any fee or credit any overpayment for such an extension of time to Deposit Account No. 03-1240, Order No. 17209-075.

In the event that a telephone conference would facilitate examination of the application in any way, Applicant invites the Examiner to contact the undersigned at the number provided.

Respectfully submitted,  
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